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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GREGORY BOUTTE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the Court of Appeals err in holding that the petitioner was required to prove harm in the trial court's refusal to order disclosure of a search warrant affidavit?

II.

Did the Court of Appeals err in holding that a "deliberate ignorance" instruction was harmless?

III.

Did the Court of Appeals err in holding that the trial court properly increased the offense level by four points under U.S.S.G. §3B1.1?

LIST OF ALL PARTIES

1. Gregory Boutte, Defendant-Petitioner.

2. The United States of America, Plaintiff-Respondent.

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TO THE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES OF AMERICA:

COMES NOW the petitioner, **Gregory Boutte,** by and through his counsel, George Michael DeGeurin, and pursuant to Rule 12, files this petition for writ of certiorari, and in support thereof would show the Court as follows:

LOWER COURT'S OPINION

The opinion of the Court of Appeals for the Fifth Circuit is published. ***United States v. Boutte***, 13 F.3d 855 (5th Cir. 1994). The full text of the opinion is reproduced in the Appendix, as is the order denying rehearing.

BASIS FOR JURISDICTION

A. The opinion of the Court of Appeals was delivered on January 27, 1994.

B. A petition for rehearing was filed. The petition was denied without further opinion on March 2, 1994.

C. Petitioner asks this Court to review a final judgment of a court of appeals of the United States. Therefore this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

D. This petition is timely if filed on or before May 31, 1994.

CONSTITUTIONAL PROVISIONS RELIED UPON

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

> naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation (emphasis added).

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, *the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence* (emphasis added).

STATEMENT OF THE CASE

In 1988 an accounting firm owned and managed by the petitioner, a certified public accountant, applied for and received a contract to administer the Minority Business Development program in the Beaumont area of Texas. This program, operated by the Department of Commerce, promotes the growth of minority-owned businesses by providing a variety of advisory services. The Triplex

Minority Business Development Center (hercinafter abbreviated "TMBDC"),[1] operated by the appellant's firm, received payment under that program for several years until the Commerce Department was advised of alleged irregularities in the program by a disgruntled former employee, Augustus Bodah. Armed with a search warrant, agents of the Federal Bureau of Investigation raided the TMBDC offices and a storage warehouse and seized records of the TMBDC program and the petitioner's firm. Eventually the petitioner, two employees, and the petitioner's accounting firm were indicted for multiple alleged violations of 18 U.S.C. §§287, 1001, and 1343, in Cause Number 1:91-CR-123 in the United States District Court for the Eastern District of Texas, Beaumont Division (Rec. Exc. Tab C).[2]

A jury found the petitioner guilty on all counts (Rec. Exc. Tab D).[3] The trial court assessed punishment at confinement for sixty months and ordered the petitioner to pay restitution. The petitioner timely appealed. A panel of the Court of Appeals for the Fifth Circuit affirmed the conviction on all counts in an opinion authored by Judge Van Graafeiland of the Court of Appeals for the Second Circuit, sitting by designation.

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[1] "Triplex" refers to the metropolitan area defined by the three cities of Beaumont, Orange, and Port Arthur, Texas.

[2] Record references are cited either to the Record Excerpts volume filed in the Court of Appeals or to volumes in the trial transcript.

[3] The petitioner's firm also was convicted. A codefendant, Judy Hill, was acquitted by the jury, while another individual codefendant was convicted on a guilty plea.

Among other claims rejected by the panel were (1) the petitioner's argument that the trial court erred in denying the petitioner access to the search warrant affidavit prior to trial, (2) the petitioner's argument that the trial court committed reversible error by submitting a "deliberate ignorance" instruction to the jury, and (3) the petitioner's argument that the trial court erred in increasing the offense level by four points under the Sentencing Guidelines for a supervisory role. The petitioner reurged those issues by petition for rehearing, which was denied on March 2, 1994.

THE FEDERAL COURT JURISDICTION

The district court had original jurisdiction over the prosecutions, which were based on 18 U.S.C. §§287, 1001, and 1343. The Court of Appeals had jurisdiction under 28 U.S.C. §1291 and Fed.R.App.P. 4.

REASONS FOR REVIEW

I.

Did the Court of Appeals err in holding that the petitioner was required to prove harm in the trial court's refusal to order disclosure of a search warrant affidavit?

Under the Fourth Amendment, search warrants must be based on probable cause. The customary way in which that requirement is implemented is through the use of an affidavit by the officer who seeks a search warrant, in which the officer states the facts known to him which he believes to show probable cause for his belief that the search of a particular place would yield evidence of crime. The affidavit then is reviewed by a neutral magistrate, who determines whether the warrant affidavit provides sufficient information to justify issuance of the warrant by the magistrate.

It was established long ago that trial courts, and in turn appellate courts, have not only the authority, but also the duty, to review the adequacy of the information presented in a warrant affidavit to support probable cause. *Weeks v. United States*, 232 U.S. 383, 392 (1914) stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures ... should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

As a practical matter, however, that review function provides only illusory protection against a search conducted pursuant to a warrant unless a defendant is given the opportunity to review the affidavit and determine whether there are particular defects which the defendant could point out to the trial court and the appellate courts. American justice is built on an adversary system, and that system malfunctions if the advocate for the party harmed by the search is given no opportunity to set the aforementioned review process in motion. The foregoing observations may seem elementary, but error occurring in this cause prejudiced the petitioner on that elementary level. The Court of Appeals' tolerance of an inroad against elementary principles of constitutional protection demands this Court's attention.

The petitioner was not given a copy of the warrant affidavit at the time of the search or upon arrest. Prior to trial the petitioner filed a motion to obtain the warrant affidiavit (Rec. Exc. Tab F), but the Government opposed that motion. The trial court then reviewed the affidavit *in*

camera (without participation by defense counsel), proclaimed the warrant affidavit adequate to support a finding of probable cause, and denied the petitioner's motion (Rec. Exc. Tab F). By its very nature, the *in camera* review was not in any sense an adversarial process, in fact more resembling the inquisatorial approach.

Without having the benefit of knowing what the affidavit said, the petitioner's counsel was not able to file a suppression motion prior to trial, as is required by Fed.R.Crim.Proc. 12(b)(3). The trial court did order release of the affidavit in the middle of trial, but by then the time for filing a suppression motion had passed. Even if there had been time under the rule, counsel hardly could devote adequate attention to Fourth Amendment issues while immersed in the evidentiary phase of a complex trial.[4] The petitioner's counsel did file a motion for leave to file a suppression motion after the affidavit was obtained, but that was too little, too late to be of any practical use.[5]

The petitioner argued in the Court of Appeals that the manner in which the trial court handled this issue deprived the petitioner of the skills which defense counsel could have brought to bear on an issue which might have had a profound effect on the trial. The Court of Appeals held that the trial court's actions did not constitute reversible error, though mildly scolding the Government and the trial court for the speciousness of the justification offered in support of

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[4] "Complex" is an understatement. In this cause the documentary exhibits were so extensive that they are maintained in several large boxes, not in a bound volume.

[5] It does demonstrate, however, that the Government's argument that defense attorneys were attempting to obtain unauthorized discovery by a procedural ruse was baseless.

concealment of the affidavit. 13 F.3d, at 858. The reasons for the Court of Appeals' decision do not hold up under scrutiny.

First, the Court commented that the warrant affidavit was not in the appellate record. If so, as the petitioner pointed out in his petition for rehearing, that was news to the petitioner, for a docket sheet entry for March 12, 1992 showed that a sealed exhibit was filed by the trial court at the motion hearing conducted on that date (Rec. Exc. Tab A, p. 5, item 119). Sealed exhibits remain in the custody of the appellate court throughout the appellate process, so the petitioner cannot really say whether or not the sealed exhibit is the affidavit, but if not, what was that sealed exhibit? Further, the Government never made any mention in its brief of the affidavit being outside the record, but rather discussed the content of the affidavit in its brief (Govt. brief, p. 17). The petitioner attached a copy of what was released at trial to his petition for rehearing, but only the district court, not the petitioner, could produce the "official" document. If the district court failed to produce the sealed exhibit for the Court of Appeals, that certainly was not the petitioner's fault, notwithstanding the Court of Appeals' suggestion to the contrary.[6]

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[6] There does not seem to have been any problem, other than some disorder, with delivery to the Court of Appeals of the voluminous exhibits which were *not* sealed. Any gap in the record in this regard is due entirely to the manner in which the affidavit, as opposed to other documents, was handled in the trial court, which simply underscores the petitioner's point. If the affidavit had been released in a timely manner, there probably would be multiple copies of it in the record by virtue of attachments to the respective defendants' suppression motions. Rather than blaming the petitioner for something done over his objection and beyond his control, the Court of Appeals should have ordered the district court to supplement the record.

What is more important in terms of constitutional jurisprudence is that the Court of Appeals held that the denial of pretrial access to the affidavit was harmless. In particular, the Court of Appeals rejected the petitioner's claim that the trial court effectively deprived him of his right to the assistance of counsel under U.S. CONST. amend. VI. On that point the Court of Appeals' decision is at odds with this Court's Sixth Amendment jurisprudence. Further, the trial court's impediment of the petitioner's attempt to comply with Fed.R.Crim.Proc. 12 (b)(3)was, in the petitioner's view, a denial of the due process of law guaranteed by U.S. CONST. amend. V.

A. Deprivation of Right to Counsel

The Court of Appeals stated that there was no authority for the view that the trial court's action impaired the right to counsel. 13 F.3d at 858. While it is true that there is no "white horse" case which specifically finds a Sixth Amendment violation in the context of judicial obstruction of presentation of Fourth Amendment issues, the absence of such a case actually indicates (1) that the trial court's action was extraordinary, and (2) that there is an unsettled constitutional issue meriting this Court's review. In fact the conclusion that a Sixth Amendment violation occurred is easily reached by comparison to decisions by this Court in related areas.

In a criminal case, the service of a lawyer is a necessity, not a luxury. *United States v. Cronic*, 466 U.S. 648, 653 (1984). The right to counsel means the right to have counsel who is able to function as an advocate. As noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984):

> That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. ... An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

In this cause defense counsel correctly believed that her advocacy role included at least exploring the possibility of suppressing certain evidence seized when the search warrant was executed, but she was obstructed in even taking the necessary first step of reviewing the warrant affidavit. In this vein, useful analogies may be drawn to two earlier decisions of this Court.

In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), this Court considered a claim of ineffective assistance of counsel where Morrison's attorney failed to raise a suppression issue within the time required by the applicable New Jersey rule. This Court recognized the validity of a Sixth Amendment ineffective assistance claim in that context. *Kimmelman* did require a showing that the Fourth Amendment claim would have had merit, so as to meet the second prong of the *Strickland* test for ineffectiveness, but it also recognized the exception to that requirement which this Court set forth in *Cronic, supra* at 659, n. 25 and *Strickland, supra* at 692: denial of effective assistance is *presumed* where Governmental interference prevents counsel from assisting an accused during a critical stage of the proceeding. 477 U.S. at 381, n. 6. In this cause the petitioner's counsel was not even given the opportunity to present a Fourth Amendment attack on the warrant affidavit, in that she was denied the basic information of what she would be attacking.

That leads to a second instructive analogy to *Brooks v. Tennessee*, 406 U.S. 605 (1972). There this Court held that a statute which required that a defendant's testimony precede testimony from other defense witnesses was an infringement on the Sixth Amendment right to counsel, as incorporated in the due process of law applicable to state courts under U.S. CONST. amend. XIV. This Court observed that this requirement "restricts the defense -- particularly counsel -- in the planning of its case," which was tantamount to denying Brooks "the guiding hand of counsel." *Id.* at 612. Here, too, the petitioner and his counsel were forced to make a decision of great tactical importance without access to the basis information necessary for that decision.

In this cause the trial court's ruling, urged by the Government, constituted governmental interference with the right to counsel at one of the most important points in the proceedings. The possibility of suppressing a large quantity of evidence was lost, as was the chance to evaluate with adequate information the choice betweeen a plea and a trial.

B. Due Process of Law; Supervisory Review

The Court of Appeals recognized that the petitioner was cut off from an opportunity to comply with Fed.R.Crim.Proc. 12, but it held that this rule of criminal procedure was not of constitutional dimension. The petitioner disagrees. While it is difficult to define such a broad concept as "due process" with precision, the process which is "due" in a criminal trial should include, at a bare minimum, the formalized rules of criminal procedure. The Court of Appeals said the petitioner had to show why a judicial order impairing the rule "hampered him in his defense," but the petitioner's brief, oral argument, and

petition for rehearing made it abundantly clear how the petitioner was harmed by being caught between the trial court's decision and Rule 12's timing requirement.

Further, appellate review is not limited to constitutional error, but also includes a supervisory power. It would be bad enough if what occurred here was an isolated instance, but the Government revealed at oral argument in New Orleans that this type of concealment of warrant affidavits is a regular practice in the Beaumont Division of the Eastern District of Texas. Such a practice might have something to commend it in a case involving potential danger to an informant, but the Government also conceded at oral argument that such was not the case here.[7]

C. Did the Petitioner Need to Prove Harm?

The crux of the Court of Appeals' rejection of the petitioner's Fifth and Sixth Amendment claims was the conclusion that the petitioner "has not disclosed any prejudice requiring reversal." 13 F.3d at 858. The petitioner maintains that this Court's review of that conclusion is warranted because (1) it conflicts with the applicable portions of this Court's Sixth Amendment doctrine, and (2) it conflicts with the approach taken by another court of appeals.

First, as discussed in Part A *supra*, this Court recognized in *Cronic* that, on some occasions:

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[7] Instead the Government's oral argument contended that the informant, Bodah, might be subjected to extraordinary economic pressure from what the Government described as a close-knit "minority community" in Beaumont. If ever the facts can call for supervision by this Court, this is the time.

> ... although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Id.* at 659-660.

That presumption should apply here, for the petitioner's counsel was prevented from providing effective advocacy for the petitioner with respect to potential Fourth Amendment arguments which could affect a large amount of evidence.

At this point the petitioner can suggest a few possible lines of attack that might have been pursued, but it is not possible to *prove* that such arguments would have been successful, since any such proof could only come at a hearing which never was conducted because of the very deprivation which is at issue here. The most important facial defect in the affidavit probably is the failure of the affidavit to set forth reasons why the investigators believed that Bodah was a credible and reliable informant in the absence of any track record. Although what was long viewed as a strict "two-pronged test" derived from *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) is no longer used after *Illinois v. Gates*, 462 U.S. 213 (1983), the components of the old test were still deemed by *Gates* to be "relevant considerations in the totality-of-the-circumstances analysis." *Gates, supra* at 233. Concededly a particularly strong statement of the "basis of knowledge" for information may offset weakness in an affidavit's stated reason for believing an informant, but here the "basis of knowledge" was not that strong, particularly with respect to the vital requirement of reason to believe that evidence of criminal activity may be found at a particular place. Equally

important here, however, was the possibility that the affidavit could be attacked as resting on false statements to the extent it depended on Bodah. *Franks v. Delaware*, 438 U.S. 154 (1978). In order to obtain a hearing on such a contention, *Franks* requires a defendant to make a "substantial preliminary showing" of the use of a false statement. *Id.* at 155-156. By being denied access to the affidavit to first determine what statements were contained in it, the petitioner was prevented from taking the first required step for a *Franks* argument. It would be both harsh and unrealistic to require the petitioner to prove the likelihood of success under *Franks* when he was not even permitted to set the process in motion.

Second, the Court of Appeals' decision conflicts with the view taken in *United States v. Wood*, 609 F.2d 246, 248 (6th Cir. 1979), a case cited in the petitioner's brief but not discussed in the Court of Appeals' opinion. *Wood* recognized that it would be inappropriate to speculate about what might have been developed at a suppression hearing. Yet that is what the Court of Appeals suggested the petitioner had to do in order to show harm. If the petitioner had done that, it is a safe bet that the Government would have condemned such speculation as being outside the record.

This Court should grant the writ in order to address the deprivation of important rights and to repudiate the Court of Appeals' conclusion that the petitioner had to prove harm in order to obtain relief.

II.

Did the Court of Appeals err in holding that the deliberate ignorance instruction was harmless?

The petitioner also complained on appeal that the trial court submitted a "deliberate ignorance" or "blind eye" instruction over objection. The Court of Appeals held that submission of this instruction was error, but nevertheless held that the petitioner failed to demonstrate that he was harmed by the instruction. The Court of Appeals reasoned that, because there was evidence that the petitioner intentionally manipulated records and directed subordinates to do the same for fraudulent purposes, there was no risk that any jurors relied on the "deliberate ignorance" instruction. The petitioner disagrees with that conclusion, but what is more important here, the petitioner thinks the Court of Appeals' approach to harm analysis is incorrect.

As far as the petitioner can tell, this Court has not addressed the question of how to assess the effect of an incorrect submission of this type of instruction to a jury. This Court has made it clear, however, that due process requires the Government to carry a burden of proof beyond a reasonable doubt as to all elements necessary to the Government's case, including the *mens rea* element. *Sandstrom v. Montana*, 442 U.S. 510 (1979). As recognized in *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992):

> The improper use of the willful blindness instruction does affect constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly, [citations omitted], thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt.
>
> There was at least some risk of that occurring here.

Despite the Court of Appeals' conclusion that there was sufficient evidence of direct knowledge to render the erroneous instruction harmless, the petitioner contends that an appellate court simply cannot be confident that the burden is discharged on the basis of evidence of direct knowledge, rather than a "blind eye" approach, where both approaches are submitted for a jury's consideration. An analogy may be drawn to the reasoning employed in *Stromberg v. California*, 283 U.S. 359 (1931) and *Leary v. United States*, 395 U.S. 6, 31-32 (1969). Although those cases concerned the risk of conviction under unconstitutional statutes, the premise of the reasoning in those cases was that it was not possible to tell which basis for conviction was relied upon by the jury. Indeed, where multiple bases for conviction are provided in the court's charge, and the only unanimity requirement is as to the "bottom line" issue of guilt, it is possible for different jurors to rely on different theories in finding a defendant guilty. Further, the Court of Appeals' assumption that evidence of direct knowledge would cure the harm conflicts with the view taken by another court of appeals. Quoting from its earlier decision in *United States v. Manriquez Arbizo*, 833 F.2d 244, 249 (10th Cir. 1987), *cert. denied* __ U.S. __, 110 S.Ct. 1793, 108 L.Ed.2d 794 (1990), the Tenth Circuit stated in *United States v. deFranciso-Lopez*, 939 F.2d 1405 (10th Cir. 1991):

> The danger in giving the instruction where there is evidence of direct knowledge but no evidence of avoidance of knowledge is that the jury could still convict a defendant who merely should have known about the criminal venture.

DeFrancisco-Lopez made it clear that the Tenth Circuit views erroneous submission of this type of charge as "an error of constitutional dimensions." *Id.* at 1412.

In order to raise the question of harm, so as to place a burden on the Government, as beneficiary of the error, to show that error was harmless, no more should be required than satisfaction of the test stated in *Estelle v. McGuire*, __ U.S. __, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991), based on *Boyde v. California*, 494 U.S. 370, 380 (1990): "whether there is a reasonable likelihood" that the jury utilized the improper charge language in convicting the petitioner. To make that clear, there is harm if there is a likelihood that even *some* of the jurors utilized the improper charge. There was such a likelihood here. The Government should be required to show beyond a reasonable doubt that the jury would have returned a guilty verdict, absent the erroneous instruction. *Barnhart*, *supra* at 652, citing *United States v. Hasting*, 461 U.S. 499 (1983) and other cases. *DeFrancisco-Lopez*, *supra* at 1412 agreed with that view.

In finding evidence of direct knowledge here, the Court of Appeals essentially assumed the petitioners culpable intent, which was very much at issue in the trial. The petitioner certainly knew of a number of the business practices which were found to be fraudulent, but the only direct evidence as to the petitioners state of mind was his own testimony that he did not intend to defraud the Government and believed that some of his seemingly unorthodox practices were permissible. In some instances there was an honest disagreement of opinion as to what was required, such as in the manner in which percentages of employees' time was calculated for purposes of allocating time between TMBDC and the petitioner's private firm's business. Thus the following observation from *DeFrancisco-Lopez*, *supra* at 1412, seems applicable in this cause:

> If the record accomodates a construction of events that supports a guilty verdict, but it does not compel such a construction, then reversal is necessary.

This Court should settle the important question of how harm should be assessed in the context of the highly controversial "blind eye" instruction, and the facts herein make this cause a suitable occasion for that task.

III.

Did the Court of Appeals err in holding that the trial court properly increased the offense level by four points under U.S.S.G. §3B1.1?

Although the petitioner primarily wants a fair opportunity to vindicate himself in a trial by jury, he also urges this Court to examine the manner in which a provision of the United States Sentencing Guidelines was applied. The Court of Appeals rejected the petitioner's argument that the trial court erred in ordering a four-point increase under U.S.S.G. §3B1.1(a) for being "an organizer or leader of a criminal activity that involved five or more participants or is otherwise extensive." Of primary concern here is the Court of Appeals' reasoning that "these individuals need not have been charged or convicted with him in order to count as participants in the criminal activity." 13 F.3d at 860. In this cause one of the other individuals was *acquitted*, and the petitioner thinks an acquitted individual should not be included in the §3B1.1 calculation.

The issue arose because paragraph sixty of the Presentence Investigation Report recommended a four-point increase on the basis that "the defendant was responsible for supervising five other individuals who, in various forms, participated in the instant offense." The trial court ordered the four-point increase "for the reasons stated in paragraph sixty, which I find are correct." Note three things, however. First, the factual representation in paragraph sixty, and hence the trial court's findings, did *not* include the alternative

justification that criminal activity supervised by the appellant was "otherwise extensive." That distinguishes this cause from *United States v. Mergerson*, 4 F.3d 337 (5th Cir. 1993), cited in the Court of Appeals' opinion. Second, paragraph sixty, and hence the trial court's findings, did *not* include the appellant within the five participants. While the appellant agrees that inclusion of a defendant on trial within the required five is a legitimate (but not a necessary) interpretation of §3B1.1(a), there should be no misconception that the trial court applied that approach in this cause. Third, the accounting partnership should not be counted as a separate "individual" for this purpose, even though it was prosecuted as an entity.

Actually the trial court, as factfinder, neither identified particular participants nor found that five participants were involved in the precise transactions underlying the various counts. *Mergerson*, *supra* at 347 noted that another circuit has held that "the district court must identify the five (or more) participants." *United States v. Schweihs*, 971 F.2d 1302 (7th Cir. 1992).[8] The petitioner assumes, however, that the district court and the Court of Appeals were including codefendant Judy Hill.

The requirement of the five "participants" for the increase under the Guidelines refers to individuals who are criminally responsible. *United States v. DeCicco*, 899 F.2d 1531, 1535 (7th Cir. 1990). Judy Hill was acquitted. An acquittal is a final determination that a particular individual is *not* criminally responsible for the conduct alleged by the Government. To the extent the district court and the Court of Appeals disregarded that basic principle, this Court needs

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[8] In this regard, footnote 11 in *Mergerson*, *supra* at 348 explains why *United States v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990) did not require affirmance of the trial court's decision here. Yet the conflicting analysis in *Schweihs* and *Barbontin* does suggest the need for this Court's review.

to reinforce the principle by establishing that it is true within the context of the Guidelines.

It could be argued that §3B1.1 on its face is ambiguous as to the inclusion of acquitted codefendants. Ambiguity in the Guidelines, which are based on delegated statutory authority, should be approached in the same manner as ambiguity in other punishment statutes. The Fifth Circuit itself implicitly accepted that approach in *United States v. Sowels*, 998 F.2d 249, 252 (5th Cir. 1993). In *United States v. R.L.C.*, __ U.S. __, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992), this Court held that if there is ambiguity in statutory punishment language, courts should "choose the construction yielding the shorter sentence by resting on the venerable rule of lenity." Application of that rule in this cause would have called for an interpretation excluding the acquitted codefendant, which could have produced a lower offense level.

Did error in application of §3B1.1 harm the petitioner, so as to require a new punishment hearing? *Williams v. United States*, __ U.S. __, 112 S.Ct. 1112, 1120, 117 L.Ed.2d 341 (1992), stated that "remand is required only if the sentence was 'imposed *as a result of* an incorrect application' of the Guidelines" (emphasis in original). *Williams* further stated that the "result" standard was met "when the error results in the district court selecting sentence from the wrong guideline range." Given the failure of the trial court to identify the participants and the high likelihood that the acquitted codefendant Hill was included in the district court's calculation, there is a substantial risk that the district court's offense level calculation, and hence the choice of punishment range, was erroneous. This Court should grant review, particularly in light of the conflict between the decision herein with *Schweihs* and *DeCicco*.

CONCLUSION

Wherefore the petitioner prays that this Court grant the writ of certiorari in this cause.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
JAN 27 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4128

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY BOUTTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

Before VAN GRAAFEILAND,* SMITH and WIENER, Circuit Judges.
VAN GRAAFEILAND, Circuit Judge:

* Circuit Judge of the Second Circuit, sitting by designation.

Gregory Boutte appeals from a judgment convicting him on five counts of wire fraud (18 U.S.C. § 1343), five counts of submitting false claims to a federal agency (18 U.S.C. § 287) and thirteen counts of making false statements to a federal agency (18 U.S.C. § 1001). Boutte contends that the district court committed reversible error in denying certain pretrial motions, making an improper evidentiary ruling and giving defective instructions to the jury. He also argues that the district court erroneously calculated his sentence. Finding no merit in these contentions, we affirm.

During government fiscal years 1988 through 1991, Boutte and his accounting partnership, Boutte, Elmore & Company, operated the Triplex Minority Business Development Center. Triplex was one of a number of development centers funded by the United States Department of Commerce for the purpose of promoting the growth of minority-owned businesses. The Department of Commerce awarded Triplex funding of $165,000 for each fiscal year. To establish that Triplex continued to meet the goals of the program, Boutte and the partnership were required to submit quarterly narrative reports ("QNRs") to the Department. The QNRs summarized the level of contract opportunities or financing that minority businesses had received with the assistance of Triplex. They also identified the partnership personnel assigned to Triplex and the percentage of time these employees devoted to Triplex matters. Triplex's failure to report a sufficient amount of services provided to minority businesses could jeopardize the continued federal funding of the center.

The Triplex QNRs from 1988 through 1991 stated that Triplex rendered assistance on numerous occasions to W. B. Construction, J. Allen Contractors and Family Construction. Indeed, these businesses were the purported recipients of most of the assistance Triplex reported during

this period. The majority of the QNRs also identified the partnership personnel assigned to Triplex and indicated the percentage of each person's time allegedly devoted to Triplex matters, the percentages varying from 35 percent to 100 percent.

Employees of W. B. Construction, J. Allen Contractors, Family Construction and other businesses testified that they never received the bulk of the assistance reported in Triplex's QNRs. Moreover, Boutte and other partnership employees solicited and received from some of these businesses copies of construction contracts that were entered into without the help of Triplex. Boutte also obtained information about contracts and financing from records the partnership maintained as regular accountant for certain businesses, and Boutte fraudulently added these contracts and financing to the QNRs to bolster Triplex's assistance statistics. In addition, both clients and employees of Boutte, Elmore & Co. testified that individuals assigned to work for Triplex devoted significantly less of their time to Triplex matters than was reported in the QNRs. Boutte attempted to disguise these discrepancies by creating two different sets of timesheets --- one for Triplex and one for the partnership.

After being fired, Agustus Bodah, a partnership employee who was reported to have devoted 100 percent of his time to Triplex, contacted Commerce officials to report the occurrence of fraudulent activities. Federal agents then obtained a search warrant for the Triplex offices and a storage warehouse, and seized voluminous documents at both locations. On October 17, 1991, a 23-count indictment was returned against Boutte, the partnership and several employees. Boutte moved before trial for production of the search warrant affidavit, for leave to file a suppression motion within a reasonable time after receiving the affidavit,

and for a bill of particulars. The Government opposed these motions and requested that the search warrant affidavit be reviewed *in camera* because it disclosed the identity of a confidential informant.

The district judge denied all three motions. With regard to the warrant affidavit, he said that he had reviewed it *in camera* and found it more than sufficient to support the issuance of the warrant. Defense counsel was given a copy of the affidavit during the trial. However, it was not made part of the record, and we have no knowledge of its contents except that we are given to understand that the confidential informant was Bodah.

We must express some wonderment as to why the district court deemed it necessary to protect the identity of the informant Bodah and why the warrant affidavit could not have been redacted sufficiently to remove Bodah's name. Having said this, we hasten to add that Boutte has not disclosed any prejudice requiring reversal. Boutte has had a copy of the warrant affidavit in his possession since June 29, 1992, and he has not deemed it necessary to get it before this Court. We assume that, if the affidavit was inadequate or if any of its contents were prejudicial, Boutte would have made certain that a copy of the affidavit was in our hands. We disagree with Boutte's argument that simply "by thwarting the application of the Federal Rules of Criminal Procedure, the trial court deprived the appellant of due process of law under U.S. CONST. amend. V." (Appellant's Brief 13) The Rules of Criminal Procedure per se are not the equivalent of constitutional dogma. Boutte must show with some specificity why the district court's ruling hampered him in his defense. *See United States v. Diaz*, 655 F.2d 580, 585-89 (5th Cir. 1981); *United States v. Hare*, 589 F.2d 242, 243 (5th Cir. 1979); *see also United States v. Mueller*, 902 F.2d 336, 341 (5th Cir. 1991).

Boutte's argument that the district court's rulings deprived him of his Sixth Amendment right to the benefit of counsel contains no citation of supporting authority, and, of course, there is none.

The district court did not abuse its discretion in denying Boutte's motion for a bill of particulars. Boutte requested the identification of an individual whose working hours were at issue in counts 1-5, and who was described only as a Triplex "business specialist." Boutte also sought identification of the "various clients" who, according to counts 11-23 of the indictment, did not receive the services reported in Triplex's QNRs. The information Boutte sought was available to him in the QNRs he submitted to the Department of Commerce, and he failed to establish that the district court's ruling resulted in " 'actual surprise at trial and . . . prejudice to his substantial rights.'" *United States v. Moody*, 923 F.2d 341, 351 (5th Cir.) (quoting *United States v. Marrero*, 904 F.2d 251, 258 (5th Cir.), *cert. denied*, 498 U.S. 1000 (1990)), *cert. denied*, 112 S. Ct. 80 (1991); *see United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979); *cert. denied*, 445 U.S. U.S. 946 (1980).

Boutte also contends that the district judge erred in instructing the jury on the concept of deliberate ignorance. Although Boutte does not challenge the correctness of the instruction as an abstract statement of the law, he asserts that the evidence below did not support the instruction because it created no inference that he purposely contrived to avoid becoming aware that the QNRs contained incorrect and deceptive statements.

A deliberate ignorance instruction must not be simply an abstract statement of the law; it must state the legal principles as they might be applied to the facts of the case being tried. *United States v. Cartwright*, 6 F.3d 294, 300

(5th Cir. 1993). There is nothing to indicate that Boutte consciously avoided becoming aware of the fraudulent activities related to Triplex. Rather, the evidence shows that Bouttte took steps to become actively involved in the illegal conduct. For example, he personally solicited copies of contracts from certain construction firms for deceptive inclusion in the QNRs; he personally assigned Triplex personnel to perform work for the partnership that was charged to Triplex; he instructed Triplex personnel to prepare two sets of time sheets in order to disguise their partnership work, and he personally reviewed these dual time sheets. His claim that he did not believe his acts were wrongful does not demonstrate that he took steps to avoid learning of the illegal conduct at the time of its commission. *See United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

To the extent that the district court's charge was error, however, the error was harmless. In *Cartwright*, *supra*, this Court held that, where there is no evidence of conscious ignorance, a deliberate ignorance instruction "is 'surplusage' and thus does 'not create the risk of prejudice.'" 6 F.3d at 301 (quoting *United States v. Samuel*, 980 F.2d 1443 (5th Cir. 1992) (unpublished), *cert. denied*, 113 S. Ct. 2967 (1993)). Giving an instruction on deliberate ignorance also constitutes harmless error where substantial evidence of actual knowledge exists. *See id.*; *United States v. Rivera*, 944 F.2d 1563, 1572-73 (11th Cir. 1991).

We find no merit in Boutte's contention that with respect to the misrepresentations alleged in counts 6-10 of the indictment, the district court's charge omitted the allegations in the indictment specific to his case. Although the district judge did not recite the specific language of the indictment with respect to counts 6-10, he did not permit the jury to convict Boutte "upon a factual basis that effectively modifies

an essential element of the offense charged." *United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993). The district judge properly set forth the elements of the offense described in 18 U.S.C. § 287 and correctly paraphrased the language of that section. He predicated conviction upon a factual basis that satisfied the essential elements of section 287. Moreover, there was little or no variance between the allegations of counts 6-10 and the evidence introduced at trial. Thus, no uncertainty exists as to whether the jury convicted Boutte for an offense not charged in the indictment. *See United States v. Young*, 730 F.2d 221, 223-24 (5th Cir. 1984).

We also reject Boutte's contention that the district court erred in failing to instruct the jury adequately on unanimity with respect to counts 6-10 and counts 11-23. With respect to counts 6-10, the district judge instructed the jury solely with respect to the filing of improper claims, not QNRs:

> For you to find any defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt. First, that such defendant knowingly presented to an agency of the United States a false or fraudulent claim against the United States, and second, that such defendant knew that the claim was false or fraudulent.

These claims, entitled "Request for Funds", were admitted into evidence as exhibits 64-68; they are the specific claims set forth and identified in the indictment. Boutte is wrong, clearly wrong, in his contention that under the court's charge the jury could have convicted him on counts 6-10 of either making false claims for payment or filing false QNRs.

Moreover, the fact that the jury might have based its finding of guilt based upon either the falsity or fraudulence of the filed claims did not vitiate the verdict. *See Turner v. United States*, 396 U.S. 398, 420 (1970); *Smith v. United States*, 234 F.2d 385, 389 (5th Cir. 1956); *Heflin v. United States*, 223 F.2d 371, 373-74 (5th Cir. 1975); with specific reference to 18 U.S.C. § 287 *see United States v. Murph*, 707 F.2d 895, 896-97 (6th Cir.), *cert. denied*, 464 U.S. 844 (1983); *United States v. Maher*, 582 F.2d 842, 846-47 (4th Cir. 1978), *cert. denied*, 439 U.S. 115 (1979).

Boutte's further contention that, although the judge's charge "included some general language requiring unanimity," it "did not require the jury to be unanimous as to which of the two theories for conviction, i.e., either 'fraudulent' claims for payment or merely 'false' quarterly reports, supported a guilty verdict in Counts 6 through 10" (Appellant's Brief 32) simply repeats appellant's misinterpretation of the court's charge already discussed in the preceding paragraphs.

Counts 11-23, on the other hand, deal clearly with the making of false and fraudulent QNRs, each count referencing a specific, dated report. The district court instructed the jurors that their verdict must be unanimous on each count. No request for a more detailed instruction on unanimity was made, and the suggestions for greater specificity contained in appellant's brief, e.g., the jury must "unanimously agree on the factual basis," are meritless.

Boutte next asserts that the district court erred in allowing the reading in evidence of the letter which Bodah wrote to the Department of Commerce to initiate the Government's investigation of Boutte's activities. The letter was not used to refresh Bodah's recollection. Neither was it offered as a prior consistent statement. Its use in this

manner was improper. However, Boutte's counsel did not object to this use of the letter, and the error in its use was not so "fundamental as to have resulted in a miscarriage of justice." *United States v. Garcia*, 995 F.2d 556, 561 (5th Cir. 1993) (per curiam); *Ettelson v. Metropolitan Life Ins. Co.*, 164 F.2d 660, 667 (3rd Cir. 1947); *Buckley v. United States*, 33 F.2d 713, 717 (6th Cir. 1929). Its contents were largely cumulative to the extensive testimony of numerous witnesses, including Bodah himself.

Boutte's final contention is that the district court erred in increasing his Guideline-controlled sentence by four levels for his role in the offense as an organizer or leader. Boutte asserts that the criminal activity for which he was convicted did not involve five or more participants within the meaning of the Guidelines. However, the district court did not clearly err in finding by a preponderance of the evidence that the Guideline requirement was satisfied. *See generally United States v. Mergerson*, 4 F.3d 337, 347 (5th Cir. 1993). In addition to Boutte himself, *see United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990), the evidence presented at trial indicated that at least four other employees participated in the fraudulent activities leading to Boutte's conviction. Contrary to Boutte's assertions, these individuals need not have been charged or convicted with him in order to count as participants in the criminal activity; they need only have participated knowingly in some part of the criminal enterprise. *See United States v. Alfaro*, 919 F.2d, 9962, 967 (5th Cir. 1990); U.S.S.G. § 381.1, comment. (n.1). Boutte has failed to demonstrate that these Triplex employees did not knowingly play a role in the fraudulent activities and that the district court's finding of participation was clearly erroneous.

The judgment of conviction is AFFIRMED.

APPENDIX B.

U.S. COURT OF APPEALS
FILED
MAR 2 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4120

UNITED STATES OF AMERICA
Plaintiff-Appellee

versus

GREGORY BOUTTE
Defendent-Appellant

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING
(March 2, 1994)

Before VAN GRAAFEILAND,* SMITH and WIENER, Cercuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ JERRY SMITH
United States Cercuit Judge

CLERK'S NOTE
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

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* Circuit Judge of the second circuit, sitting be designation.